SANITARY LEGISLATION.

COURT DECISIONS.

KENTUCKY COURT OF APPEALS.

Sewage—Nuisance—City Held Liable for Damages for Nuisance Caused by Discharging Sewage into a Small Stream.

KRAVER ET AL. v. SMITH, 177 S. W. Rep., 286. (May 14, 1915.)

The owner of land along a natural watercourse is entitled to the natural flow of the water unimpaired in quality except as may be occasioned by reasonable use of the stream by others.

Pollution of a stream by sewage, causing illness and rendering the water unfit for stock and other purposes is a nuisance, for which damages may be recovered against a city.

The fact that sewage has been discharged into a certain stream for a long time does not justify continuance of the practice when a nuisance is created.

A city has the power to control and regulate its drains and sewers, and a property owner has no right to connect a private sewer with the city sewer without the consent of the municipality. The city also has authority to regulate the character of the sewage which any property owner may discharge into the city sewer, but where a property owner is allowed to make connection with a city sewer and no attempt is made to regulate the character of matter discharged into the sewers, the city is liable for damages caused by the discharge of matter from the city sewers into a stream, creating a nuisance.

Suits for damages were brought against the city of Henderson, Ky., and Henry Kraver, who operated a distillery in the city, by a number of persons who owned or occupied land along Canoe Creek, which is a small stream. The opinion deals with nine of these cases which were tried together. The appellees complained that the discharge of slops from the distillery, filth, and human excrement from the sewers of the city of Henderson had polluted the water of the creek, killed the fish, rendered the stream unfit for watering stock, created illness, and had depreciated the value of their property.

Each appellee secured a verdict in the court below against both appellants, the amounts varying from $200.68 to $507.

The following is quoted from the opinion, which was delivered by Mr. Justice Hurt:

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The city of Henderson, by its answer, traversed the affirmative allegations of the petitions, and, in, addition to that, alleged that it had constructed sewers, which emptied into Canoe Creek, because it was the natural drainage for the sewerage [sic]; that the sewers were well constructed and reasonably used; and that the sewerage drained into the creek was the same or similar to that which had been drained into the creek for more than 15 years before the institution of the suits; and that it had obtained and continued to exercise

its rights to drain its sewerage into the creek by continuously doing so, and relied upon the statute of limitations of 15 years as a bar to the appellees' causes of action; * * * and that, if the appellees were damaged as alleged in their petitions, the damage was due to the drainage into the creek of the sewerage which came from Kraver's distillery plant, and not by any act of the city, and made its answer a cross petition against Kraver, and asked a judgment against him for any amounts which might be recovered of it by the appellees.

The evidence offered proved that Canoe Creek was a natural watercourse, passing through or bordering upon the lands of each of the appellees, but that at some time or other, which the evidence did not disclose, a portion of the stream had been straightened in some places, under a proceeding in the county court, and that the stream was under control, for the purpose of keeping it in repair and removing obstructions, of the board of drainage commissioners. It had not been materially altered from its original course, and it does not appear that the stream has been materially changed where bordering on or passing through the lands of the appellees. The proof also showed that for several years last past the city of Henderson had three sewers which emptied into the creek, and which carried off a large part of the slop, waste water, filth, contents of closets and baths of the city, and deposited them into the creek. For several years last past until August, 1912, the appellant Kraver has had a private sewer extending from the distillery into the creek, which carried off during the times of the operation of the distillery very large quantities of slop arising from the distillation of corn and other grain. This slop when it first leaves the distillery is milky white in color and flows easily, but when it reaches the creek it settles to the bottom, and by exposure to the action of the water and air after a time the solid elements in it turn very black, decompose, and give off a very nauseating odor. On account of the current of the stream being sluggish, the solid elements of this slop settle and form a substance upon the bottom of the stream, which continues, in fact, for months thereafter, and the fish in the stream, coming in contact with this decomposed slop from the distillery and the filth and excrement from the city's sewers, die, and their decomposure results in an addition to the nauseating smells arising from the stream. High water in the stream has the effect to wash out these irritating causes and to clarify the water. From the first or middle of April to late in the autumn of the year the smell from the stream is annoying and sickening, requiring the appellees and their families, when eating or retiring at night, to close their doors to keep the unpleasant odors away from them. Cattle refuse to drink the water of the stream, and the appellees lose its use on that account.

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On the 27th day of July, 1912, the distillery company made written application to the city engineer of the city requesting permission to tap the Sandefer mill and Canoe Creek sewer at a point about 360 feet west of Canoe Creek with a 10-inch pipe, and agreeing to comply with the rules as stipulated in the ordinances, and not to permit anyone to connect with the tap made by him, unless permitted by the common council. This application was approved by the city engineer on the same day, and on the same day the distilling company received a writing signed by the city clerk stating that, the distilling company having complied with the ordinance governing the tapping of sewers in the city of Henderson, it was authorized to tap the Sandefer mill and Canoe Creek sewer, on ——— side of ———, about 360 feet west of Canoe Creek, between ——— streets, the work to be done under the supervision of the city engineer. Relying upon this procedure, Kraver, as the president of the distilling company

in the month of August, 1912, caused a sewer to be constructed from the distillery to the city sewer, and thereafter, and up to the time of the bringing of these suits, the slop from the distillery was discharged into the city's sewer. The city's sewer led into the creek, and the distillery slop passed through it into the creek, in place of through the distilling company's private sewer, as it had done theretofore, up until the 8th day of May, 1913, by which time the city had constructed a sewer from the bank of Canoe Creek into the Ohio River, and had connected its sewers which ran into the creek in such a way as to cause all of their contents to be deposited in a well near the bank of the creek, wherein it installed a pump, which pumped the contents of the well through the new iron sewer to the Ohio River, excepting when a heavy downpour of rain occurred, when portions of the sewerage would continue to pass into the creek. On the 28th day of June the pump broke, and for five days, until it could be repaired, all of the sewerage passed into the creek. In the well was fixed a screen made of three-quarter iron rods, through which the sewerage would pass before reaching the pump, and for the purpose of preventing sticks and stones and other large obstructions from coming in contact with the pump. When the pump was found broken, investigation was made, and it was found that the solid portions of the distillery slop had settled upon the floor of the well against the screen to the depth of from 4 to 4½ feet, and, as it was claimed by the representatives of the city, broke the screen and permitted sticks and tin cans to pass into and come in contact with the pump, causing it to break. After five days it was repaired, and, the distillery having ceased to operate it about two days thereafter, the pump was able to thereafter perform the service expected of it, and no further sewerage passed into the creek.

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Both of the appellants, the city and Kraver, insist that Canoe Creek was not a natural watercourse, and for that reason the persons through whose lands it ran, or upon whose premises it bordered, had no riparian rights in it, and hence the court erred in instructing the jury that one of the elements of damages to which the appellees were entitled was the loss of the reasonable use of the waters of the stream for watering their stock, if it was polluted to such an extent that it could not be used for that purpose. There is no evidence which disputes the fact of its being a natural watercourse, and has existed there at all times. A portion of the stream has been straightened, but it has nowhere been taken away from the lands of the appellees. A riparian owner has been defined to be one owning land which is bounded by a natural watercourse, or through which a stream flows, and the rights to which such owner is entitled are appurtenant and annexed to the land, and the person owning such lands is entitled to the natural flow of the water, unimpaired in quality, except as may be occasioned by reasonable use of the stream by other proprietors, and he has a right to make any use of the water which is beneficial to himself, so long as he does not inflict any substantial injury to those below him upon the stream. (40 Cyc., 558, 560, 563; Redmon *v.* Forman, 83 Ky., 214; Juett *v.* Renaker, 13 Ky. Law Rep., 782; Hicks *v.* City of Owensboro, 6 Ky., Law Rep., 225.) To use water from such stream for the purposes of stock water upon the premises of the holder of the land has always been held to be a riparian right. The mere straightening of the stream or cleaning it out in order to facilitate the flow of the water, without separating it from the lands of the appellees, would not take away from them their riparian rights.

The contention that the nuisance created by polluting this stream and poisoning the atmosphere around it, and rendering the houses of the appellees uncomfortable, and causing sickness of the appellees and their families, and rendering the water unfit for stock and other purposes, is a public nuisance for which

the appellants are not liable in damages is not tenable. It has been uniformly held by this court that the damages resulting from a public nuisance which affects all of the public alike creates no cause of action which a particular individual may rely upon for damages for such injuries, but it has always been held that one suffering damages from a public nuisance which are special or peculiar to himself may sustain an action for such injuries. (Barr *v.* Stevens, 1 Bibb, 293; Cosby *v.* O. & R. R., 10 Bush, 291; L. & N. R. R. *v.* Cooper, 164 Ky., 489; 175 S. W., 1034.) The damages sought in this action is the loss of the use of the water from the creek, which is the peculiar property of the riparian owner, and the diminution in the value of his lands and his home by reason of the nuisance is an injury falling upon the persons so situated as to necessarily sustain such injury, and do not affect all the public alike.

The claim of a prescriptive right on the part of the appellants to run their sewerage into the creek, and that for that reason they were not liable in damages for a nuisance created by it, was not allowed by the trial court and properly so, because there was no evidence offered upon which to base such a claim. The city, upon its part, offered no evidence upon that subject at all, and, if it had, it could not have been allowed as a defense, because, while the owners of the lands adjacent to the creek would have no right at any time to complain of the discharge from the city into the creek of the surface waters, which would naturally find an outlet into the creek, neither the city nor could Kraver claim to have a prescriptive right to turn the filth of the sewers, human excrement, slops, and other poisonous things into the stream. (City of Henderson *v.* Robinson, 152 Ky., 245; 153 S. W., 224.)

Proof was introduced by the appellant Kraver which tended to show that the distillery operated by him was located near the creek in 1880, and that its slops had been continuously discharged into the creek up to August, 1912, but the proof further shows that the character of the slops which went into the creek previous to the year 1908 or 1909 did not pollute the waters nor create a nuisance, and it was only the character of the slops which had gone from the distillery into the creek since 1908 which polluted the stream and created the nuisance complained of.

It has been held that one creating a nuisance is liable to anyone who is injured by it, but one merely continuing a nuisance, as the purchaser of property which is a nuisance, is not liable until he is requested to abate it. (Ray *v.* Sellars, 1 Duv., 256; West *v.* L. & N. R. R., 8 Bush, 406.) The proof, however, showed that Kraver created this nuisance or assisted to create it within five years before the bringing of the suits, by discharging into the creek a different kind of slop, with other ingredients, than that used theretofore, and besides, had been sued for the same character of injuries before the bringing of these suits, and hence could not claim to be a mere continuer of a nuisance.

In the case of Fertilizing Co. *v.* Hyde Park, 97 U. S., 668; 24 L. Ed., 1036, the court, discussing the doctrine of prescription as applying to a nuisance which continued from year to year, said:

> Every right, from absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others. In such cases prescription, whatever the length of time, has no application. Every day's continuance is a new offense, and it is no justification that the party complaining came voluntarily within its reach. Pure air and the comfortable enjoyment of property are as much rights belonging to it as the right of possession and occupancy. If population, where there was none before, approaches a nuisance, it is the duty of those liable at once to put an end to it.

This court, in the case of Ashbrook *v.* Commonwealth, 1 Bush, 140; 89 Am. Dec., 616, where an indictment was had against one maintaining a public nuisance in the city of Covington, and it was shown that the nuisance consisted

of maintaining a cattle pen and slaughterhouse, and that it had been so continued for 30 years last past, this court held the conviction proper, and said:

> The pursuit of a noxious trade is lawful so long as it does not interfere with the rights of the public; but, when it does so interfere with these superior rights, it becomes illegal, and no length of time can sanctify it, as its exercise is a daily renewal of the offense.

In 29 Cyc., 1207, the doctrine is thus stated:

> There is no such thing as a prescriptive right to maintain a public nuisance, and hence prescription is no defense to a proceeding to abate a nuisance, either by public authorities or by a private individual, or to an action by a private individual for damages for the injury which he has received, or to an indictment against the person maintaining the nuisance.

The motion of the appellant Kraver for a judgment in his favor, notwithstanding the verdict of the jury, was not based upon any good reason, as the pleading sufficiently supported the verdict.

Both of the appellants objected to the instructions given, and both of them are insisting that the instructions of the court to the jury were prejudicial to them. Instructions Nos. 1, 2, 3, 5, 6, and 7 were substantially correct, and not susceptible of any just criticism, but instruction No. 4, as given by the court, was prejudicial, at least so far as it related to the appellant Kraver. The appellant Kraver pleaded in his answer that a judgment had been rendered in his favor against his codefendant, the city of Henderson, in the circuit court of the county, by which it was adjudged that he was entirely within his rights when he connected his distillery by a sewer with the city sewer, and that the judgment had never been vacated, modified, or set aside, and that he for that reason could not be held liable for any nuisance which was set up in Canoe Creek by any discharge of the slops from his distillery into it after he connected it with the city sewer in August, 1912. The city of Henderson appealed from that judgment to this court, and it was affirmed by this court by an opinion in the case of City of Henderson *v.* Kentucky Peerless Distilling Co. (161 Ky., 1; 170 S. W., 210). There was no error by the court below in excluding the evidence offered by the city in the trial of the case at bar attempting to show that the sewer from the distillery was wrongfully connected with the city sewer. The appellant Kraver offered an instruction in writing, in substance, directing the jury that it should not find against him any damages for injuries caused by the discharge of the distillery slops into the creek after he had connected the distillery with the city sewer. The court overruled his motion to so instruct the jury, and he excepted. There is no doubt, as contended by counsel, that the city had the power to control and regulate its drains and sewers, and that a property owner has no right to connect a private sewer with the city sewer without the consent of the municipality. There is no doubt but that the city has authority, after its sewers are constructed, to regulate their use and protect them against injury and invasion by ordinances, and also to regulate the character of the sewerage which any property owner may discharge into the city sewer. (Dillon on Municipal Corporations, sec. 805; Tipton *v.* City of Shelbyville, 107 S. W., 810; 32 Ky. Law Rep., 1123; 28 Cyc., 919.) The proof, however, in this case conclusively shows that the board of health of the city, with knowledge of the character of sewerage passing from the distillery, by its executive officer ordered appellant Kraver to make the connection, and that he did so by the authority of the city and under the supervision of its engineering department.

The city had not, by any ordinance, regulated the quantity or character of sewerage which appellant Kraver was authorized to discharge into the sewer, and from the circumstances it can be presumed only that it was intended that such sewerage as came from the distillery was to pass into the city sewer.

The instructions given by the court authorized the jury to find against appellant Kraver on account of any injuries arising from the passing of the sewerage from his distillery into Canoe Creek up until the 8th day of May, 1913, at which time the city installed its well and pumping station, and thereafter, if it believed that Kraver had negligently discharged a character of slop into the sewer, which caused the pump to break, when he, by the exercise of ordinary care, could have known that the pumping station was insufficient to carry off the sewerage. In this we are of the opinion that the court was in error, as Kraver made the connection with the city sewer with the knowledge, consent, and direction of the city and under the supervision of its engineering department, and thereafter it was the duty of the city alone to take care of the sewerage.

In place of instruction No. 4, as to Kraver, the court should have, in substance, instructed the jury that he was not liable, and that it should not find any damages against him on account of any injuries to the appellees arising from nuisance created in the creek by the discharge of distillery slops into the creek after Kraver had by his private sewer connected the distillery with the sewer, if all of his sewerage passed into the city sewer and did not escape into the creek from any private sewer of his own which connected with the creek. Instruction No. 4 was more favorable to the appellant city of Henderson than it was entitled to, and it therefore can not complain of it.

For the reasons herein stated, the judgments of the appellee Martin against the appellants is affirmed as to the city of Henderson, and reversed as to appellant Kraver. The motion of appellant Kraver to grant an appeal in each of the other cases is sustained, and the judgments therein against him are reversed. The motions of city of Henderson to grant it an appeal in the other said cases is overruled. The causes are remanded to the court below, with directions to proceed in conformity to this opinion.